SUPREME COURT, U.S.
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No. 94-1809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

WALTER MINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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RULE 29.1 STATEMENT

Pursuant to Sup. Ct. R. 29.1, Petitioners Matsushita Electric Industrial Co., Ltd. and Matsushita Holding Corporation hereby state that their only parent or subsidiary that is not wholly-owned is Cineplex Odeon Corporation.

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PETITIONERS' REPLY BRIEF

The Ninth Circuit's opinion announced new legal principles of broad applicability concerning (1) the balance of authority between state and federal courts, (2) the implication of private rights of action under administrative rules, and (3) the nature of the event that triggers federal tender offer regulation. Each of these new legal principles puts the Ninth Circuit in irreconcilable conflict with the established law of other circuit courts:

- In conflict with the law of the First and Third Circuits, the Ninth Circuit refused to give Full Faith and Credit to a state court judgment entered upon a class action settlement, utilizing an analysis that jeopardizes all comprehensive settlements of state court class actions which involve the compromise of both state and exclusively federal claims. *Petition for a Writ of Certiorari* ("*Pet.*") at 10-17.

- In conflict with the law of the District of Columbia, Third, and Sixth Circuits, the Ninth Circuit held that an agency rule promulgated pursuant to an enabling statute that has been held to be privately enforceable *automatically* will have a private right of action. *Pet.* at 17-21.

- In conflict with the law of the Fourth Circuit (and uniform SEC authority), the Ninth Circuit transformed a precise and well understood tender offer regulation into an amorphous rule, thereby eliminating the predictability necessary to structure tender offers. *Pet.* at 21-24.

Far from merely resolving a "unique" factual dispute, the Ninth Circuit's enunciation of these new legal principles has generated extraordinary uncertainty in a number of legal arenas.

Respondents suggest that the Court look past this case on the strength of their representation that the Delaware settlement was the product of a corrupt state bar and judiciary. *Epstein Brief in Opposition* ("*Epstein Opp.*") at 15-26. Yet Respondents concede that such was not the basis of the Ninth Circuit's decision. *Id.* at 5, 22. The Ninth Circuit's opinion urgently requires review because it provides circuit court authority to upset state court approved class action settlements releasing both state and federal claims *regardless* of the adequacy of class representation or level of judicial review to which the settlement was subjected.[1]

This petition is not premature. Contrary to Respondents' suggestion that further district court proceedings may "moot or reshape" the Ninth Circuit's holdings, *Epstein Opp.* at 3, the Ninth Circuit's decision has established novel and far reaching legal principles, none of which can be altered by proceedings on

[1] The adequacy of representation and notice to the class were litigated in the Delaware Chancery Court, which held that both were adequate. *See* App. 73a-74a. These findings are entitled to preclusive effect. *See, e.g., Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 32 (1st Cir. 1991). In any event, as Respondents concede, the Ninth Circuit's holding is not predicated on these issues. Respondents are, in addition, barred from now attacking the Delaware proceedings as a result of their strategic decision to absent themselves from those proceedings. *See, e.g., Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Assoc.*, 455 U.S. 691, 710 (1982).

remand. The court of appeals entered summary judgment for Respondents and held that Matsushita had violated Rule 14d-10 as a matter of law. Thus, the Ninth Circuit has conclusively resolved the substantive liability issues with respect to Mr. Wasserman's receipt of Matsushita preferred stock, leaving only an assessment of damages for determination on remand.[2]

I. THE NINTH CIRCUIT HAS CREATED A NEW RULE OF STATE-FEDERAL PRECLUSION THAT VIOLATES PRINCIPLES OF FEDERALISM AND FRUSTRATES CLASS ACTION SETTLEMENTS

Respondents' opposition briefs fail to address each of the following points:

- The Ninth Circuit disregarded the provision of the Full Faith and Credit Act that required the Ninth Circuit to give the Delaware judgment approving the class action settlement the same preclusive effect that a Delaware court would give it. *See, e.g., Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986); *Pet.* at 10.

- Delaware courts would have enforced the release embodied in the judgment and precluded further prosecution of any claims encompassed in the release by any class members who did not opt out of the Delaware settlement. *Pet.* at 10-11 & n.6.[3] The

[2] *See* 28 U.S.C. § 1254(1); *see also* 17 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4036, at 19 (1988) ("[c]ertiorari may be granted to review decisions that do not dispose of the pending litigation"); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 566-67 (1979) (certiorari granted to review circuit court decision reversing and remanding dismissal for no private right of action); *Miller v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (certiorari granted when "resolution of this basic [private right of action] issue should be made at this stage of the litigation and not postponed until after a trial under the Court of Appeals' decision"); Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 197 (7th ed. 1983) (gathering cases in which this Court has reviewed decisions "where the court of appeals had reversed the granting of a motion to dismiss and . . . remanded for trial").

[3] Professor Coffee's article, *Suspect Settlements in Securities Litigation*, N.Y. L. J. at 5, col. 1 (Mar. 28, 1991), upon which Respondents heavily rely (*Epstein Opp.* at 25-26), addresses non opt out settlements. But the judgment to which the Ninth Circuit refused to afford full faith and credit involved an opt out settlement.

Ninth Circuit, however, never addressed Delaware preclusion law—a *per se* reversible error. *See, e.g., Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 387 (1985); *Pet.* at 10.

- Respondents also fail to address the central inquiry of a preclusion analysis: whether the federal securities laws create an implied repeal of 28 U.S.C. § 1738. Respondents do not challenge the fact that the only relevant case law holds that the federal securities laws do not create such an implied repeal. *Pet.* at 15.

Rather than follow the teachings of *Parsons, Marrese* and other cases decided by this Court and cited in the Petition, the Ninth Circuit created an exception to the Full Faith and Credit Act for any class action potentially touching on exclusively federal claims. The national consequences of this decision for class action litigations are enormous. *Pet.* at 7-8, 15-17.

Matsushita's petition seeks relief from the failure of the Ninth Circuit to afford full faith and credit to a class action *judgment incorporating a release*. Matsushita's position is not premised on the theory that a claim was litigated to conclusion in the state court action and therefore subject to claim preclusion. Respondents pointlessly focus on the prerequisites for claim preclusion, which are irrelevant to an analysis of the effect of a release contained in a judgment entered on a class action settlement. Indeed, the Ninth Circuit's failure to recognize the distinction between the preclusive effect of a release contained in a judgment and the doctrine of claim preclusion is a fundamental flaw in its analysis.

With this distinction in mind, it is apparent that *Nottingham, Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994), and *Sandler Associates, L.P. v. BellSouth Corp.*, 818 F. Supp. 695 (D. Del. 1993), *aff'd without op.*, 26 F.3d 123 (3d Cir.), *cert. denied*, 115 S. Ct. 481 (1994), are directly contradicted by the Ninth Circuit decision. *Pet.* at 11 (setting forth the law of the First and Third

Circuits with respect to the preclusive effect of a release).[4] In addressing the First and Third Circuit authorities, Respondents skirt *Nottingham* (thereby avoiding any substantive discussion of the law of the First Circuit), omit reference to the relevant portion of *Grimes* concerning release, and ignore entirely the *Sandler* decision.

The Ninth Circuit's straightforward disregard of a state court judgment presumed to be otherwise valid is a matter of general public importance. If allowed to stand, the decision will subvert established principles of comity and federalism, proliferate litigation in federal forums by forcing shareholder litigation into federal court, and defeat the legitimate expectations of settling parties by refusing to hold class plaintiffs to the express terms of a settlement to which they never objected and pursuant to which they accepted compensation. *Sandler*, 818 F. Supp. at 705; *see Pet.* at 16-17.

II. TENDER OFFERS REQUIRE CERTAINTY REGARDING THE PARAMETERS OF RULE 14d-10

The scope of federal tender offer regulation is likewise a matter of national importance. The Ninth Circuit's holding concerning the scope of Rule 14d-10, contrary to Respondents' assertion, is not limited to the supposedly "unique" and "complex" Wasserman transaction. While the Wasserman transaction involved a complex structure, the decision of the Ninth Circuit *should* have turned on the simple and straightforward question of whether the transaction occurred *during the tender offer*. As written (and as previously construed by courts and universally understood by securities law practitioners), Rule 14d-10 operates

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[4] Respondents' assertion that the Delaware settlement released claims factually unrelated to the federal claims is irrelevant and demonstrably false. The operative complaint in the Delaware action included a claim that the defendants had breached their fiduciary duties by according "preferential treatment" to Wasserman whereby he would "receive preferred stock in a subsidiary of Matsushita in exchange for his holdings of MCA shares" in order "to afford [him] tax-free treatment not available to other shareholders, and to save Wasserman millions of dollars in taxes that would be due if he received cash." *Appendix to Supplemental Brief of Defendants-Appellees Regarding Preclusion*, at A29, ¶¶ 46, 48. This is the same alleged discriminatory treatment in favor of Wasserman that is the essence of the Rule 14d-10 claim.

during a specifically-defined time period: from the commencement of the tender offer (defined in Rule 14d-2) until the time the tender offer terminates (upon the offeror's acceptance of tendered shares, *see, e.g.*, Section 14(d)(7)).[5] Applied as written, the Rule does not encompass the Wasserman (or Sheinberg) transaction.[6] There is no question that based on the stipulated facts the Wasserman transaction occurred when no tender offer was pending. *Pet.* at 22 n.20; *see also* App. 49a-50a (stipulated facts incorporated in the district court judgment). If the transaction occurred outside the regulated period, it is no more relevant if it occurred 10 minutes or 10 months outside that period.

The Ninth Circuit "deemed" the Wasserman transaction to have occurred during the tender offer period (regardless of when the transaction actually occurred), based on its conclusion that the Wasserman transaction was "conditioned" on the success of the tender offer. The Ninth Circuit's decision creates a new rule that plainly encompasses any transaction of any form that is "conditioned" on the tender offer being consummated, and any transaction that may be deemed an "integral part" of a tender offer, regardless of when such a transaction actually takes place. This holding deals a fatal blow to certainty and predictability and may well create a litigation morass.

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[5] Two particularly egregious misstatements of law by Respondents must be noted. First, Respondent Minton's discussion of Rule 14d-2 carefully scissors out a crucial operative provision of that Rule. In its *entirety*, Rule 14d-2 makes clear that when, *as was stipulated here*, the bidder files a Schedule 14D-1 within five days after the public announcement, the tender offer period commences on the date of that filing and *not* at 12:01 a.m. on the date of the public announcement. *See* Rule 14d-2(b)(2)(i). The Wasserman transaction indisputably occurred outside the tender offer period because the parties stipulated that the Wasserman transaction was entered into before and consummated after the tender offer period as defined in Rule 14d-2 and Section 14(d)(7). *See Pet.* at 22 n.20. Second, in addressing the merits of Rule 14d-10, Respondents rely heavily on arguments purportedly derived from Section 14(d)(7). Respondents fail to acknowledge that Section 14(d)(7) was never pleaded in an operative complaint. Nor does (or could) Section 14(d)(7) play any role in the Ninth Circuit's decision regarding the merits of Rule 14d-10. *See Pet.* at 20-21.

[6] Compliance with the 1934 Act requires reference to definite, easily ascertainable rules. Sections 13(d)(1) and 16(b), for example, establish precise periods of application. *See* 15 U.S.C. §§ 78m(d)(1); 78p(b).

The decision below also widened the scope of Rule 14d-10 by applying it to the employment-related payment to Mr. Sheinberg. The decision puts into question whether payments conventionally made to members of the management of a company in connection with their employment (such as bonuses if they agree to stay on after a tender offer) violate Rule 14d-10—even though courts and the SEC have approved such payments for many years.[7] Thus, it is the Ninth Circuit's decision to adopt a flexible interpretation to a heretofore precisely-defined Rule 14d-10 that makes review by this Court so critical in this case. The Ninth Circuit's decision undoes the specificity of Rule 14d-10 and thereby the predictability of the law governing tender offers—a concern addressed by this Court in other securities cases. *See, e.g., Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 12 (1985); *Pinter v. Dahl*, 486 U.S. 622, 652-53 (1988).[8]

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[7] *See, e.g., Kramer v. Time Warner, Inc.*, 1990-91 Fed. Sec. L. Rep. (CCH) ¶ 95,619 at 97,902-903 (S.D.N.Y. 1990), *aff'd*, 937 F.2d 767 (2d Cir. 1991). In *Canoga Industries*, 1976 SEC No-Act. LEXIS 606 (Mar. 9, 1976), the SEC approved an acquisition plan that contemplated a private agreement which was to be entered into prior to the announcement of the tender offer, pursuant to which the tender offeror would purchase certain shareholders' stock on terms and for consideration different than those being offered to the public. There, as here, the private agreement was closed following the expiration of the tender offer. *See also Guthrie Corp.*, 1975 SEC No-Act. LEXIS 1316 (June 29, 1975) (same); *W.R. Grace & Co.*, 1975 SEC No-Act. LEXIS 749 (Apr. 17, 1975) (same).

[8] *Field v. Trump*, 850 F.2d 938 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), the only case relied upon by Respondents in support of their interpretation of Rule 14d-10, is inapposite. In analyzing two ostensibly separate public tender offers which were alleged to constitute one tender offer, *Field* found only that the plaintiffs therein had pleaded the minimal level of facts to survive a Rule 12(b)(6) motion to dismiss their Section 14(d)(7) claim. At issue was whether "the purported withdrawal" of the "first" tender offer was real. *Id.* at 943. The Second Circuit concluded that "the mere announcement of a withdrawal may not be effective if followed by purchases of shares and other conduct inconsistent with a genuine intent to withdraw." *Id.* at 944. No question similar to those in the instant case was before the *Field* court and *no Rule 14d-10 claim was at issue*. The Second Circuit has had no trouble limiting *Field* to its unique facts, *see Kramer v. Time Warner, Inc.*, 937 F.2d 767, 779 (2d Cir. 1991), and, until the Ninth Circuit opinion, *Field* had never been followed.

III. THE NINTH CIRCUIT HAS CREATED A NEW AND IMPROPER STANDARD FOR IMPLYING PRIVATE RIGHTS OF ACTION

Respondents do not challenge the core of Matsushita's implied rights analysis.[9] As Matsushita previously demonstrated, the Ninth Circuit's implied rights analysis leads to the untenable result that every rule promulgated pursuant to a privately enforceable statute has a private right of action. *Pet.* at 19. The cases cited by Respondents finding an implied right of action under Sections 14(d)(7) and 14(d)(6) are irrelevant. *See, e.g., Field*, 850 F.2d at 945 (Section 14(d)(7)); *Pryor v. United States Steel Corp.*, 794 F.2d 52, 57-58 (2d Cir.) (Section 14(d)(6)), *cert. denied*, 479 U.S. 954 (1986). In their complaints and now, Respondents make their claims under Rule 14d-10, not Section 14(d)(7). Rule 14d-10 should not be read to afford a private right of action because even if a private right is recognized under Section 14(d)(7), "the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991). The Epstein Respondents state that "[t]he rule [14d-10(c)] requires that where a tender offerer employs more than one kind of consideration . . . each shareholder must be allowed the same right to choose among the options offered." *Epstein Opp.* at 7. This erroneous interpretation of Rule 14d-10(c), which was endorsed by the Ninth Circuit, goes far beyond Section 14(d)(7), which requires that *higher* consideration be paid to certain shareholders before a claim is actionable.

[9] Respondents' claim that Matsushita's implied right of action point was not properly presented on appeal is meritless and was rejected by the Ninth Circuit.

CONCLUSION

The decision of the court of appeals creates important conflicts with the law of other circuits on three issues of national significance. The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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